RECEIVED
MAY 12 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Misc. No. 74-6521

MONICA ALDINGER, Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

R. MAX ETTER, SR.
Spokane & Eastern Building
Spokane, Washington 99201

NORMAN ROSENBERG
Spokane Legal Services Center
West 246 Riverside Avenue
Spokane, Washington 99201

Counsel for Petitioner

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	
DOES THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON HAVE THE POWER TO JOIN A PENDENT STATE CLAIM THAT IS RELATED TO AN EXISTING FEDERAL CLAIM, WHEN SUCH JOINDER REQUIRES THE INCLUSION OF A PARTY NOT THEN SUBJECT TO FEDERAL JURISDICTION?	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	
I. THERE IS A CONFLICT IN DECISIONS OF THE CIRCUIT COURTS OF APPEALS ON WHETHER UNITED MINE WORKERS V. GIBBS, 383 U.S. 715 (1966) ALLOWS A FEDERAL COURT THE POWER TO EXERCISE JURISDICTION OVER A PARTY ON A PENDENT STATE LAW CLAIM WHEN SUCH PARTY IS NOT INVOLVED IN THE RELATED FEDERAL CLAIM	3
II. "WHETHER THERE EXISTS JUDICIAL POWER TO HEAR THE STATE LAW CLAIMS AGAINST THE COUNTY IS, IN SHORT, A SUBTLE AND COMPLEX QUESTION WITH FAR REACHING IMPLICATIONS".	7
III. THE INSTANT CASE IS AN APPROPRIATE VEHICLE FOR RESOLUTION OF THIS IMPORTANT QUESTION.	8
CONCLUSION	10
APPENDIX	
ORDER OF DISMISSAL OF THE DISTRICT COURT	App 1
OPINION OF THE COURT OF APPEALS	App 2

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.

CITATIONS OF AUTHORITY

	Page
Astor-Honor, Inc. v. Grosset and Dunlap, Inc., 441 Fed. 2d 627 (CA 2, 1971)	6,9
Beautytuft, Inc. v. Factory Insurance Association, 431 F.2d 112 (CA 6, 1970)	6
Connecticut General Life Insurance Co. v. Crofton, 415 Fed. 2d 800 (CA 2, 1971).	9
Hatridge v. Aetna Casualty & Surety Co., 415 Fed 2d 809 (CA 8, 1969).	7
Hymer v. Chai, 407 Fed. 2d 136 AC 9, (1969).	6
Leathers Best, Inc. v. Mormaclyn, 451 Fed. 2d 800 (CA 2, 1971).	9
Moor v. County of Alameda, ___U.S.___, 93 S. Ct. 1785, 36 L.ed 2d 596 (1973)	3,4,7
Patrum v. City of Greensburg, 419 Fed. 2d 1300, (CA 6, 1969)	9
Schulman v. Huckfinn, Inc., 472 Fed. 2d 864 (CA 8, 1973)	9
Shippers and Receivers Coop. Association v. Penn Central Trans. Co., and F.F. Houghton & Co., Inc., 355 F. ed 2d, 949 (E.D. Penn. 1973).	9
U.M.W. v. Gibbs, 383 U.S. 715, 86 S. Ct. 1139, 16 L.ed 2d 218 (1966).	3,4,5,6

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Misc. No._____

MONICA ALDINGER, Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, MONICA ALDINGER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 7, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The one page Order of Dismissal by the District Court for the Eastern District of Washington, entered September 25, 1973, also appears in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201

was entered on April 7, 1975. A petition for rehearing en banc was denied on April 7, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Federal District Court for the Eastern District of Washington have the power to join a pendent state claim that is related to an existing federal claim, when such joinder requires the inclusion of a party not then subject to federal jurisdiction.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In August, 1971, the petitioner was unlawfully and unconstitutionally terminated from her position in the Spokane County Treasurer's Office. As a consequence, petitioner filed a civil action, pursuant to 42 U.S.C. § 1983, against the treasurer of Spokane County and against the County of Spokane. The complaint alleged, inter alia, the deprivation of certain enumerated constitutional rights as well as asserted pendent jurisdiction over state law claims arising out of the same

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201

incident.

After various pre-trial matters of no importance to the instant petition, defendant Spokane County, citing Moor v. County of Alameda, ____U.S.____, 93 S.Ct 1785, 36 L.ed 2nd 596 (1973) moved for judgment on the pleadings, alleging that 42 U.S.C. § 1983 did not authorize jurisdiction over this corporate defendant. The District Court dismissed the federal claim against the County of Spokane. The federal claim against the treasurer, however, remained. In granting the Motion to Dismiss, the District Court further ruled that it did not have the power to exercise pendent jurisdiction over the state law claims against Defendant Spokane County, inasmuch as there was no longer an independent basis of federal jurisdiction over this defendant. An order to that effect was entered on September 25, 1973 (appended as Appendix A).

The petitioner, citing U.M.W. v. Gibbs, 383 U.S. 715, 86 S. Ct. 1139, 16 L.ed 2d 218 (1966), raised solely the "pendent jurisdiction" question on appeal to the Circuit Court of Appeals for the Ninth Circuit. The District Court's ruling was affirmed by an opinion entered April 7, 1975 (appended as Appendix B).

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT IN DECISIONS OF THE CIRCUIT COURTS OF APPEALS ON WHETHER UNITED MINE WORKERS V. GIBBS, 383 U.S. 715 (1966), ALLOWS A FEDERAL COURT THE POWER TO EXERCISE JURISDICTION OVER A PARTY ON A PENDENT STATE LAW CLAIM WHEN SUCH PARTY IS NOT INVOLVED IN THE RELATED FEDERAL CLAIM.

The decision of the court below holding that United Mine Workers v. Gibbs, supra, does not allow a federal court

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201

the power to exercise jurisdiction over a party on a pendent state law claim when there is no viable federal claim involving that party is directly in conflict with numerous decisions of other Circuit Courts of Appeals which have construed Gibbs on this issue. Moreover, not only is this conflict expressly recognized by the Circuit Courts of Appeals, but it has produced decisions in which there is express criticism of each other's position.

It is agreed by all that the opinion in Gibbs decides the question of whether the federal district court has the power to entertain pendent state law claims against parties over whom there is federal jurisdiction. The question, however, that has not yet been definitely answered is whether the district court has the power to exercise pendent jurisdiction over state law claims against parties over whom there is no independent basis of federal jurisdiction. It is upon this issue that the Ninth Circuit Court of Appeals differs with every other Circuit Court of Appeals that has considered the question.[1]

Each Circuit Court of Appeals that has had occasion to consider this issue has relied upon the holding in Gibbs, and particularly the following statements, to extend the concept of pendent jurisdiction to include the joinder of parties as well as of claims.

> "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to

---

[1] Compare Footnotes 29 and 30, Moor v. County of Alameda, 93 S. Ct. 1785 (1973).

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201

> try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." (Emphasis the court's), 383 U.S. at 725, 86 S.Ct. at 1138.

and

> "Under the rules, the impulse is toward entertaining the broadest scope of action consistant with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged." (Emphasis added) 383 U.S. at 724 and 86 S.Ct. at 1138

Each Circuit Court has ruled, citing Gibbs as guidance, that the District Court may, as a matter of discretion, elect to join pendent parties. The Ninth Circuit, however, has steadfastly refused to budge from its pre-Gibbs holding that there is no power in the District Courts to entertain state claims against a party over whom there is no independent basis of federal jurisdiction.

This difference of opinion has resulted in expressed criticism by the Circuit Courts of Appeals of one anothers positions, and at present, constitutes an anomaly within the federal court system. It is an anomaly that encourages forum shopping, and provides significent benefits to litigants in one geographic area as opposed to another. Further, it is an anomaly that is unnecessary and unjustified, for the court below has not, in any of its prior decisions, provided a sound, reasonable, or practical basis for its holding. On the other hand, many of the Circuit Courts of Appeals, when extending pendent jurisdiction to include pendent parties, have expressed sound and practical reasons therefore.

"Pendent jurisdiction was devised to avoid the waste and inefficiency resulting from fragmenting a single action and

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201
Tele. 838-3871

dividing the pieces into separate proceedings before the state and federal courts, and to encourage a party who had a claim presenting a substantial federal question mixed with a non-federal claim, to take his bundle of claims to the federal court".[2] Typical of the statements by Circuit Courts of Appeals in support of this concept and practice are as follows:

> "...It would be an unjustifiable waste of judicial and professional time---indeed, a travesty on sound judicial administration--- to allow Astor to try its unfair competition claim against Buckley and Bantam in federal court but to require it to prosecute a claim involving precisely the same facts against Grosset 'in a state court a block away'. The absence of any constitutional barrier to entertaining a sufficiently related state claim against a person who was not a party to the federal claim was recognized, prior to Gibbs, in cases involving compulsory counter-claims under F.R. Civ. P. 13(a) (citations omitted), and third-party claims under F.R. Civ. P. 14 (citations omitted)." Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (CA 2 1971) at 629-30

and

> ".....the claims arise out of the same transaction and the proofs required (except as to amount of liability) are identical in every respect. Clearly, in the interest of avoiding sheer waste of court time, these claims should be tried together. We believe the District Judge was entirely correct in asserting pendent jurisdiction as to the 24 defendants." Beautytuft, Inc. v. Factory Insurance Association, 431 F.2d 112 (CA 6 1970) at 1128

and

> "In any event, we find ourselves in sympathy

---

[2] Interestingly enough, this cogent analysis was made by Circuit Judge Hufstedler of the Ninth Circuit immediately prior to ruling that the concept of pendent jurisdiction applied solely to claims and not to parties. Hymer v. Chai, 407 Fed.2d 136 CA 9 (1969).

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201
Tele. 838-3871

> with the third circuit approach for appropriate cases; it makes good sense; it avoids forum shopping and multiple actions; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time." Hatridge v. Aetna Casualty & Surety Co., 415 Fed 2d 809 (CA 8 1969).

This quote was stated by Mr. Justice Blackmun when he served on the 8th Circuit Court of Appeals.

II

"WHETHER THERE EXISTS JUDICIAL POWER TO HEAR THE STATE LAW CLAIMS AGAINST THE COUNTY IS, IN SHORT, A SUBTLE AND COMPLEX QUESTION WITH FAR REACHING IMPLICATIONS".

The above quote by this court in the case of Moor v. County of Alameda, supra at 1799, provides the most persuasive reason for granting the instant petition for writ of certiorari. This accurate appraisal of the importance of the issue presented was made in a case very similar to the instant case. In that case, however, this court did not consider it appropriate to resolve this difficult issue because it was concluded that, even assuming the existence of power to hear the claim, the district court, in exercise of its legitimate discretion, properly declined to join the claims against the county. This is not the situation that is presented in the instant case. As the order of dismissal entered in the District Court reflects, the court felt itself to be without power to hear these claims and gave no indication of the propriety of doing so. In fact, the inclusion in the order of dismissal of a certificate pursuant to FRCP 54(b) and 28 U.S.C. §§ 1292(b) reflects the District Court's desire to have this question of law resolved.

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201
TELE. 838-3671

III

THE INSTANT CASE IS AN APPROPRIATE VEHICLE FOR RESOLUTION OF THIS IMPORTANT QUESTION.

The Court of Appeals for the Ninth Circuit, in voluminous dicta, suggests that this case does not provide a suitable opportunity for reconsidering its prior holdings. By so stating, the court below is doing precisely what it prohibits the district court from doing; analyzing, on a case by case basis, the appropriateness of exercising pendent jurisdiction over claims against a non-federal party.

The District Court did not take the liberty of so doing. The District Court ruled, as a matter of law, that it was without "...the power to exercise pendent jurisdiction over the claims against Spokane County, inasmuch as this court now has no independent basis of jurisdiction over this defendant". Hence, this case is unclouded by any suggestion that there was an exercise of discretion by the District Court. That court did not consider the merits of the claim against the county, nor did it consider the propriety of joining the county defendants. The court ruled simply that it was without the power to do so.

Petitioner seeks solely to allow the District Court the power to consider and determine whether it is appropriate to join her state claims against Defendant Spokane County with the existing federal claims against the County Treasurer. This is the power that the Second, Third, Fourth, Fifth, Sixth, and Eighth Circuit Courts of Appeals have granted to the district courts within their jurisdiction, and it is interesting to note that this power has been exercised in many diverse types of cases. The District and Circuit Courts have allowed the joinder

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201
TELE. 838-3671

of pendent parties, both plaintiffs and defendants, in federal question cases, diversity cases, admiralty cases,[3] cases under Section 301 of the Labor Management Relations Act[4], patent infringement cases[5], copyright infringement cases[6], cases under the Interstate Commerce Act, 49 U.S.C. 20[7], and Civil Rights cases[8]. In each of these cases, the court has exercised its discretion and has determined whether it was useful, necessary, helpful and/or convenient to allow non-federal claims against non-federal parties, provided such claims were appropriately related to an existing federal claim. The District Courts that reside within the Ninth Circuit presently do not have the power to exercise this discretion.

---

[3] Leathers Best, Inc. v. S.S. Mormaclynx, 451 Fed. 2d 800 (CA 2, 1971).

[4] Connecticut General Life Insurance Co. v. Crofton, 415 Fed. 2d 41, (CA 5, 1969).

[5] Schulman v. Huckfinn, Inc., 472 Fed. 2d 864 (CA 8, 1973).

[6] Astor-Honor, Inc. v. Grosset and Dunlap, Inc., 441 Fed. 2d 627 (CA 2, 1971).

[7] Shippers and Receivers Coop. Association v. Penn Central Trans. Co., and F.F. Houghton & Co., Inc., 355 Fed 2d, 949, (E.D. Penn. 1973).

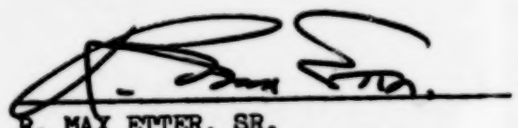
[8] Patrum v. City of Greensburg, 419 Fed. 2d 1300, (CA 6, 1969).

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201
TELE. 838-3671

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully Submitted,



R. MAX ETTER, SR.
Spokane & Eastern Building
Spokane, Washington 99201

NORMAN ROSENBERG
Spokane Legal Services Center
West 246 Riverside Avenue
Spokane, Washington 99201

Counsel for Petitioner

SPOKANE COUNTY LEGAL SERVICES
W. 246 RIVERSIDE AVE.
SPOKANE, WA. 99201
TELE. 838-3671

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington

SEP 25 1973

J. R. FALLQUIST, Clerk

_____ Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MONICA ALDINGER,
Plaintiff,
vs.
MERTON L. HOWARD, et al.,
Defendants.

No. 3556

ORDER OF DISMISSAL

Defendant's motion for judgment on the pleadings having come on for hearing, the plaintiff represented by her attorneys, Spokane County Legal Services by Norman Rosenberg, and Max Etter, Jr., defendants represented by Gerald Geiger, Deputy Prosecuting Attorney for Spokane County, and the court having before it and considering the memoranda of the parties and having heard and considered argument, it is hereby ordered as follows:

The defendant's motion for judgment on the pleadings is hereby granted and this action is dismissed as to the defendant Spokane County in that 42 U.S.C. 1983, and 42 U.S.C. 1988, do not empower this court to exercise jurisdiction over this defendant, nor has this court the power to exercise pendent jurisdiction over the claims against Spokane County, inasmuch as this court now has no independent basis of jurisdiction over this defendant.

CERTIFICATE PURSUANT TO FRCP 54(b) AND
28 U.S.C. 1292(b)

It is determined by the court that there is no just reason for delay and hereby directs the entry of final judgment as to the defendant Spokane County.

Further, this court is of the opinion that the above order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

DATED IN OPEN COURT THIS 24th DAY OF SEPTEMBER, 1973.

MARSHALL A. NEILL

UNITED STATES DISTRICT JUDGE

Approved as to form:

Attorney

Attorney for Plaintiff

BEST COPY AVAILABLE

FILED
APR 7 1975
U.S. COURT OF APPEALS
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONICA ALDINGER, a single woman,
Plaintiff-Appellant,
v.
MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and JANE DOE HOWARD, his wife,
Defendants-Appellees.

No. 73-3129

OPINION

Appeal from the United States District Court
for the Eastern District of Washington

Before: CARTER, WRIGHT and WALLACE, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order dismissing appellant's action against Spokane County, Washington. The order of dismissal was certified by the district court, pursuant to Fed. R. Civ. P. 54(b), as appropriate for immediate appellate review. We have jurisdiction under 28 U.S.C. § 1292(b).

Appellant Monica Aldinger sued Spokane County, its county commissioners, and its elected county treasurer, Howard, and his wife. She sought injunctive and declaratory relief and damages for what she claimed was her wrongful dismissal from employment in the county treasurer's office.

FPI-Sandstone
5-1-74—1000M—1073

This dismissal, she asserted, was based solely on the allegation that she had been "living with [her] boy friend," and as such was subject to redress under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988] as a violation, under color of state law, of her constitutional rights under the First, Fifth, Ninth, and Fourteenth Amendments. Appellant also asserted that these same facts gave rise to a cause of action against the county under Wash. Rev. Code § 4.08.120 (1973) (providing for vicarious liability of counties in certain situations), and asked the district court to exercise pendent jurisdiction over these state law claims.

In granting the county's motion that it be dismissed as a party, the district court ruled that neither 42 U.S.C. § 1983 nor § 1988 provides for a federal cause of action against a county under 28 U.S.C. § 1343, and that the pendent state law claim against the county must therefore also be dismissed "inasmuch as this court now has no independent basis of jurisdiction over this defendant." We affirm.

A. FEDERAL QUESTION JURISDICTION.

Appellant contends that her second amended complaint stated a cause of action under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988 (1970)] which fell within the district court's 28 U.S.C. § 1343 jurisdiction.[1/] This argument is foreclosed by the Supreme Court's holding in Moor v. County of Alameda, 411 U.S. 693 (1973), aff'g in part and rev'g in part Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972).

In Moor, the Supreme Court addressed the same question as that presented here: whether these Civil Rights Act provisions apply to political subdivisions of a state. Relying heavily on its earlier decision in Monroe v. Pape, 365 U.S. 167 (1961), the Court concluded that:

> ". . . § 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983."

411 U.S. at 710.

Both Moor v. County of Alameda and Monroe v. Pape were civil rights actions wherein the relief sought was money damages. In the case before us, the appellant sought declaratory and injunctive relief as well as damages.

However, any possibility that a political subdivision might be a suable "person" under §§ 1983 and 1988 for purposes of declaratory and injunctive relief was eliminated by the Court's subsequent decision in City of Kenosha v. Bruno, 412 U.S. 507 (1973). In that case, the Court reviewed a three-judge court's determination that § 1983 provided for 28 U.S.C. § 1343 jurisdiction over an action by owners of a retail liquor establishment against the city of Kenosha, Wisconsin. Their action challenged that city's failure to conduct formal adversary hearings before refusing to renew plaintiffs' liquor license. Reversing, the Court stated:

> "We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in Monroe, 'Congress did not undertake to bring municipal corporations within the

> ambit of' § 1983, id., at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343."

Id. at 513.

Finally, we consider City of Kenosha v. Bruno controlling even though plaintiffs in that case sought to enjoin the actions of a city rather than a county. Moor v. County of Alameda clearly indicates that this difference is inconsequential as to § 1983 liability by using the terms "municipality" and "political subdivision" interchangeably. See, e.g., 411 U.S. at 708. Consequently, the district court correctly determined that appellant failed to state a federal cause of action for either damages or for injunctive and declaratory relief.

B. JURISDICTION OVER THE PENDENT STATE LAW CLAIMS.

Appellant admits that, if the district court lacked jurisdiction over her federal causes of action against the county, it was required to dismiss her pendent state law claims against this defendant, together with the federal claims, by this court's decisions in Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969) and Moor v. Madigan, supra. She suggests, however, that we should now abandon the Hymer rationale because: (1) the Supreme Court's opinion in Moor v. County of Alameda left the continued validity of Hymer in considerable doubt; and (2) the great majority of other courts which have considered this question have determined that pendent jurisdiction should be available to join parties as well as claims. We disagree.

In Moor v. County of Alameda, the Court was presented with the very question which is before us: Can

a district court hear a party's state law claims against a named defendant over whom there is no independent federal basis for jurisdiction, where the nonfederal claims arise out of the same facts and circumstances as viable federal claims against other parties?

The Moor Court, however, purported to avoid reaching this question. Instead, it chose to affirm the alternative holding of the lower courts that "as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims," (458 F.2d at 1221), even if there was federal court power to adjudicate them. 411 U.S. at 715-17.

In the case before us, the district judge made no alternative ruling on the suitability of this case for the discretionary exercise of pendent jurisdiction. Rather, he based his dismissal of the state law claims against Spokane County exclusively on the ground that, under this court's decisions in Hymer v. Chai and Moor v. Madigan, he had no power to hear claims against "pendent parties."

Appellant contends that Moor v. County of Alameda contains language which compels a re-examination of this court's opinions in Hymer and Moor.

In Hymer v. Chai, we first considered whether the Supreme Court's expansion of the doctrine of pendent jurisdiction in United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), allowed joinder of additional parties as well as joinder of state law claims arising out of "a common nucleus of operative fact" with viable federal claims. We said that "[j]oinder of claims, not joinder of parties, is the object of the doctrine," 407 F.2d at 137, and held such an expansion unwarranted.

In Moor v. Madigan, we said:

> "We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in Hymer. Having found ample support for the position taken by this court in Hymer and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on Hymer in refusing to exercise jurisdiction over the pendent state claims."

458 F.2d at 1221 (footnote omitted).

In Moor v. County of Alameda, the Supreme Court noted that "Hymer stands virtually alone against [the] post-Gibbs trend in the courts of appeals" to permit district courts to hear pendent claims involving additional parties, where the entire action arises out of a single constitutional "case" as defined in Gibbs. 411 U.S. at 713-14. The Moor Court went on to note the substantial analogies between the joinder of parties under pendent jurisdiction and under expanded concepts of ancillary jurisdiction reflected in Fed. R. Civ. P. 13(a), 13(h), and 14(a).

However, the Supreme Court's opinion also recognized that there are strong arguments in favor of restricting at least certain types of state law actions to available state forums rather than hearing them in federal courts. The Court concluded that the question of federal judicial power to hear such state law claims against "pendent parties" is "a subtle and complex question with far-reaching implications," presenting difficult issues not appropriate for resolution in the case there before it. 411 U.S. at 715.

FPI-Sandstone 5-1-74—100M—1073

It seems clear to us that we are not bound by any of the above-noted dicta in Moor v. County of Alameda to reconsider our decisions in Hymer v. Chai and Moor v. Madigan. We are therefore free to dispose of this issue on the basis of our previous stand in Hymer just as this court disposed of the similar challenge to the Hymer rationale in Moor v. Madigan. See 458 F.2d at 1221.

Appellants have also asked that this case be considered en banc, in the event that we should affirm the determination of the district court. We are not unaware of the widespread rejection of Hymer by other courts. In fact, support for this court's position seems to have eroded since our holding in Moor v. Madigan.[2/] However, we are of the opinion that any reconsideration of Hymer should occur in the context of a case which affords a more inviting opportunity for abandonment or modification of that opinion than does the one before us.

Judge Peckham's thoughtful analysis in Rundle v. Madigan, 331 F. Supp. 492 (N.D. Cal. 1971), demonstrates several reasons why a case like Moor or this one presents the weakest rationale for the expansion of Gibbs to cover pendent parties. See id. at 494-95. In the first place, appellant here seeks to press her state claims against a party defendant who would not otherwise be in federal court. This situation presents a greater risk of serious inconvenience to the defendant than does allowing an additional plaintiff to pursue his state claims in federal court against a defendant already subject to that court's jurisdiction as to other claims arising out of the same facts.

FPI-Sandstone 5-1-74—100M—1073

Secondly, diversity cases have generally presented more attractive opportunities for the exercise of pendent jurisdiction over additional parties asserting state law claims than have analogous cases arising in the context of federal actions based on federal question jurisdiction. In part, this is due to the fact that since all the claims arising in the diversity context are based on state law, they are for that reason more easily tried together than cases where the two sets of claims are based on substantially different theories of law. Also, as Judge Peckham noted, in the diversity cases where joinder of "pendent parties" has been permitted, the courts have often been confronted with claims by members of a single family arising out of a single accident. "The litigation of these intimately related claims in a single forum makes good practical sense." 331 F. Supp. at 495.

We are also of the view that lower federal courts should be cautious in expanding Gibbs to the type of situation involved in this case. Pendent jurisdiction remains a judicially-created basis for federal court jurisdiction, albeit an eminently reasonable one in many cases. Since Congress specifically declined to render political subdivisions subject to suit under the Civil Rights Act of 1871, it is at least arguable that this legislation and Congress' failure to repeal it reflect a congressional disinclination to see local governmental units subjected to actions in federal courts arising out of alleged deprivations of the civil rights of their own citizens.[3/]

Finally, pendent state law claims arising in the context of federal civil rights actions will almost

inevitably involve the same sort of difficult and unsettled questions of state law, and result in the same concomitant potential for jury confusion, which the district court found likely in Rundle v. Madigan, supra.[4/] This prospect, we think, would usually prompt the district judge to refuse to exercise jurisdiction over the pendent claims against a city or county, even though he had the discretionary power to accept it.[5/] Hence, to say that there was power to adjudicate the state law claims would, in most cases such as this one, involve giving with one hand what will be taken away by the other.

The judgment of the district court is affirmed, and the district court is directed to proceed with appellant's actions against the remaining defendants.

FOOTNOTES

1/ Appellant's complaint also alleged that jurisdiction lay under 28 U.S.C. § 1331(a), and that the amount in controversy exceeded $10,000. A divided Second Circuit panel has recently found that such a jurisdictional allegation can sustain a direct action under the Fourteenth Amendment against a municipality not subject to the district court's § 1343 jurisdiction. Brault v. Town of Milton, ____ F.2d ____ (2d Cir., Feb. 24, 1975).

In Brault, however, the plaintiffs had relied on § 1331 as the sole asserted basis for federal question jurisdiction, and had consistently asserted a cause of action under the Fourteenth Amendment. Appellants in this action have consistently chosen to rely on their §§ 1983 and 1988 claims under § 1343, along with their pendent state claims, as the basis on which relief for Spokane County's alleged deprivations of their constitutional rights could be granted. Consequently, the district judge did not reach the question of whether the complaint would have been otherwise adequate to establish a § 1331 cause of action against a political subdivision of a state, nor need we reach that question here.

2/ Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), was the only post-Gibbs appellate case from another circuit to which we were able to point in Moor v. Madigan, 458 F.2d at 1221, as supportive of Hymer. On reflection, however, this case cannot be said to stand for the proposition that, in all situations, the district court is without discretion to join pendent parties. The Sixth Circuit's rejection of the Hymer rationale is in any event made clear by that court's subsequent decision in F. C. Stiles Contracting Co. v. Home Insurance Co., 431 F.2d 917, 919-20 (6th Cir. 1970), cited in Moor v. County of Alameda, 411 U.S. at 713 n.29.

3/ Cf. Brault v. Town of Milton, ____ F.2d ____ (2d Cir., Feb. 24, 1975), slip op. at 1876 (Timbers, J., dissenting.

Of course, a county is still subject to a federal court action based on state law claims brought against it by a citizen of another state meeting the jurisdictional amount requirement. See Moor v. County of Alameda, 411 U.S. at 717-22.

4/ In Rundle v. Madigan, the district court found that adjudicating the state law claims would require it "to resolve difficult questions of [state] law upon which state court decisions are not legion." 331 F. Supp. at 495 n.5. The court also took particular note of the complex nature of the defenses and justifications Alameda County might be able to raise. Id.

In the case before us, the district court did not consider whether similar defenses would have been available to the county in an action under Wash. Rev. Code § 4.08.020. However, appellee has suggested several difficult issues relating to its susceptibility to vicarious liability under that section in cases of this sort. It would thus appear that the potential for jury confusion would also have been substantial in this case. The jury would have had to keep in mind the distinct state law standards applicable to each class of defendants, as well as the relevant criteria for assessing the possible § 1983 liability of the non-county defendants.

5/ Courts which have had occasion to make such discretionary rulings on the appropriateness of joining pendent municipal or county defendants in federal civil rights actions against local officials have regularly opted to dismiss the pendent claims. See, e.g., Patrum v. City of Greensburg, 419 F.2d 1300, 1302 (6th Cir. 1969); cf. Moor v. County of Alameda, 411 U.S. at 715-17; Moor v. Madigan, 458 F.2d at 1221. Even if we were to accept appellant's suggestion and remand this case, there is no reason to expect that the district judge would not act similarly and exercise his discretion against hearing the pendent claims against Spokane County.